

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**GIA DINH LE, Appellant**

**and**

**U.S. POSTAL SERVICE, STATION "A" POST  
OFFICE, Dallas, TX, Employer**

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**Docket No. 04-756  
Issued: June 9, 2004**

*Appearances:*  
*Gia Dinh Le, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
WILLIE T.C. THOMAS, Alternate Member

**JURISDICTION**

On January 27, 2004 appellant filed a timely appeal of a January 28, 2003 merit decision of the Office of Workers' Compensation Programs denying modification of an August 26, 1999 decision, finding that appellant had not established that he sustained an emotional condition in the performance of duty. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the emotional condition issue.

**ISSUE**

The issue on appeal is whether appellant sustained an emotional condition in the performance of duty.

**FACTUAL HISTORY**

This is appellant's second appeal before the Board in this case. By decision remanding case issued November 19, 2002,<sup>1</sup> the Board set aside a May 11, 2001 decision of the Office

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<sup>1</sup> Docket No. 02-384.

denying appellant's March 25, 2001 request for reconsideration of an August 26, 1999 decision, on the grounds that it was untimely filed and did not present clear evidence of error. The Board found that it could not perform an informed adjudication of the case as the record submitted by the Office lacked much of the evidence relied on by the Office in issuing its March 25, 2001 decision: appellant's June 15, 1999 request for reconsideration of the June 16, 1998 decision initially denying his claim; Equal Employment Opportunity Commission (EEOC) testimony by coworker Sandra Weimer; a March 4, 1999 note by Dr. Frederick Petty, an attending clinical psychologist; an April 21, 1999 report by Dr. Martin Kram; May 10, 1999 correspondence from the Office of Personnel Management (OPM); a June 15, 1999 affidavit by Roger T. Williams, an employing establishment labor relations specialist. The Board, therefore, directed the Office to reconstruct the case record and issue a *de novo* decision in the case. The law and the facts of the case as set forth in the Board's order remanding case are hereby incorporated by reference.

On remand of the case the Office conducted development to obtain the missing documents. In a December 20, 2002 letter, the Office requested that appellant submit the June 15, 1999 request for reconsideration and the reports of Dr. Kram and Dr. Petty. The Office requested that the employing establishment submit Ms. Weimer's EEOC testimony, Mr. Williams' affidavit and the May 10, 1999 correspondence from OPM. Accompanying a December 30, 2002 letter, appellant submitted Ms. Weimer's testimony, Mr. Williams' affidavit and the OPM correspondence.<sup>2</sup>

In a May 10, 1999 decision, the OPM denied appellant's claim for disability retirement on the grounds that he had not established that he had a disabling medical condition. In a June 15, 1999 affidavit, Mr. Williams stated that he heard Sherry Wilson, an employing establishment injury compensation specialist, "verbally abuse" appellant over the telephone, provoking a "verbal confrontation causing him to make wild statements" which she reported to employing establishment officials to ensure his compensation claim would be rejected. At an EEOC hearing on an unspecified date, Ms. Weimer testified that appellant was harassed by supervisors Larry Johnson, Dave Peterson and Donnell Walder after he was injured at work. She alleged that supervisors observed appellant casing mail hoping to find errors, complained that he was a slow worker and changed his schedule several times in an attempt to get him to quit and that Mr. Walder also thought that appellant's injury was "fake."

Appellant also submitted a March 1997 worksheet resolving a grievance by changing one hour of absence without leave (AWOL) to sick leave on March 21, 1997. The employing establishment denied appellant's grievances related to a schedule change, overtime work, not being allowed timely union representation and withholding of personnel records. There is no

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<sup>2</sup> The record contains an August 17, 2001 report from Dr. Robert Ippolito, a Board-certified plastic surgeon, regarding a female patient with bilateral carpal tunnel syndrome. This report appears unrelated to appellant's case. Appellant also submitted February and March 2002 reports regarding a bilateral knee condition pursuant to his Claim No. A16-0275440 for heel spurs sustained on or before February 28, 1995. This claim is not before the Board on the present appeal. Appellant also submitted an October 25, 2000 request for reconsideration of a March 27, 2000 decision. This request was rendered moot by the Board's November 19, 2002 decision remanding case and is not relevant to the present appeal.

decision of record regarding appellant's grievance regarding his desire for a higher rate of pay for performing computer tasks.

By decision dated January 28, 2003, the Office denied modification of the August 26, 1999 decision on the grounds that the evidence submitted was insufficient to warrant such modification as appellant failed to establish his allegations of harassment or any other compensable factor of employment. The Office found that Ms. Weimer's testimony and Mr. Williams' affidavit did not substantiate any specific incident of harassment. The Office further found that the grievance worksheets related to administrative matters not within the performance of duty and that appellant had not demonstrated error or abuse in the conduct of these matters.

### **LEGAL PRECEDENT**

The Federal Employees' Compensation Act<sup>3</sup> provides for the payment for compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>4</sup> The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of an in the course of performance."<sup>5</sup> "Arising in the course of employment" related to the elements of time, place and work activity. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his employer's business, at a place where he may reasonably be expected to be in connection with his employment and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto. This alone is not sufficient to establish entitlement to compensation. The employee must also establish an injury "arising out of the employment." To arise out of employment, the injury must have a causal connection to the employment, either by precipitation, aggravation or acceleration.<sup>6</sup>

As the Board observed in the case of *Lillian Cutler*,<sup>7</sup> workers' compensation law does not cover each and every illness that is somehow related to the employment. When an employee experienced emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his duties and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true when the employee's disability resulted from his emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work. By contrast,

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Id.* § 8102(a).

<sup>5</sup> This construction makes the statute actively effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

<sup>6</sup> See *Eugene G. Chin*, 39 ECAB 598 (1988); *Clayton Varner*, 37 ECAB 248 (1985); *Thelma B. Barenkamp* (*Joseph L. Barenkamp*), 5 ECAB 228 (1952).

<sup>7</sup> 28 ECAB 125 (1976).

there are disabilities having some kind of causal connection with the employment that are not covered under workers' compensation law because they are not found to have arisen out of employment, such as when disability results from an employee's fear of a reduction-in-force or frustration from not being permitted to work in a particular environment or to hold a particular position.

### ANALYSIS

Appellant attributed his emotional condition principally to the actions of his supervisor, Mr. Johnson. As noted workers' compensation law does not cover an emotional reaction to an administrative or personnel action unless the evidence establishes error or abuse on the part of the supervisor.<sup>8</sup> He asserted that Mr. Johnson would not assign him to perform the computer tasks that he preferred to mail processing duties, changed his duty schedule to times he did not like, refused to grant him additional work hours or overtime and would not promote him to a desired position. However, assigning work is an administrative function of a supervisor. Frustration from not being permitted to work in a particular environment or to hold a particular position is not covered by workers' compensation.<sup>9</sup> Monitoring work is also an administrative function of a supervisor. Ms. Weimer stated that supervisors observed appellant casing mail, but this is not a compensable factor absent proof of error or abuse on the part of those supervisors.<sup>10</sup> Appellant has submitted insufficient evidence to demonstrate error or abuse by supervisors in monitoring his speed casing mail.

Approving or denying a leave request is also an administrative function of a supervisor. While appellant had a grievance resolved regarding substituting sick leave for an hour of AWOL, he has not established that the AWOL finding was administratively erroneous. A grievance worksheet indicates that the matter was resolved but not that there was any error or abuse on the part of the employing establishment. The Board has held that grievances and EEOC complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.<sup>11</sup> Also, the grievance worksheets appellant submitted do not substantiate any administrative wrongdoing by the employing establishment.

Appellant also alleged that he was terminated from federal employment in retaliation for filing compensation claims and grievances. The decision to terminate an employee is administrative in nature and is not considered to be within the performance of duty unless error or abuse is shown.<sup>12</sup> However, the evidence in this case establishes that appellant's removal was administratively reasonable as his own physician found him at risk for violent behavior in the

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<sup>8</sup> *Thomas D. McEuen*, 42 ECAB 566, 572-73 (1991); *reaff'd on recon.*, 41 ECAB 387 (1990); 41 ECAB 387 (1990).

<sup>9</sup> *See supra* text accompanying note 6.

<sup>10</sup> *Daryl R. Davis*, 45 ECAB 907 (1994).

<sup>11</sup> *James E. Norris*, 52 ECAB 93 (2000).

<sup>12</sup> *See Artice Dotson*, 41 ECAB 754 (1990).

workplace. Therefore, he has not established a compensable factor of employment with regard to his termination from federal employment.

Appellant has submitted no evidence in the case apart from his own feelings and the view of two coworkers or former coworkers, that employing establishment officials committed error or abuse in discharging their supervisory or managerial duties. Appellant has thus not established any compensable employment factors in this regard.

Appellant also attributed his condition to an alleged pattern of harassment and discrimination by employing establishment officials. As a rule, allegations alone by a claimant are insufficient to establish a factual basis for an emotional condition claim.<sup>13</sup> In *Kathleen D. Walker*,<sup>14</sup> the Board held that a claimant's unfounded perceptions could not constitute a compensable factor of employment. Mere perceptions and feelings of harassment or discrimination will not support an award of compensation. The claimant must substantiate such allegations with probative and reliable evidence.<sup>15</sup> While Ms. Weimer testified that appellant was harassed by his supervisors, she did not describe any specific incidents of harassment or identify any date on which the alleged harassment occurred. Similarly, while Mr. Williams asserted that Ms. Wilson verbally abused appellant, he did not provide the dates or contents of any altercations.<sup>16</sup> Also, the grievance worksheets submitted by appellant fail to demonstrate any wrongdoing by the employing establishment. Thus, appellant submitted insufficient evidence to establish his allegations of harassment and discrimination.

### **CONCLUSION**

The Board finds that appellant has not established that he sustained an emotional condition in the performance of duty as he failed to substantiate any compensable factor of employment. Under the facts and the circumstances of this case the Office's January 28, 2003 decision properly denied modification of the August 26, 1999 decision, finding that appellant submitted insufficient evidence to modify the prior denial of his emotional condition claim. As appellant did not establish any compensable factor of employment, the medical record need not be addressed.<sup>17</sup>

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<sup>13</sup> See *Arthur F. Hougens*, 42 ECAB 455 (1991); *Ruthie M. Evans*, 41 ECAB 416 (1990) (in each case the Board looked beyond the claimant's allegations of unfair treatment to determine if the evidence corroborated such allegations).

<sup>14</sup> 42 ECAB 603, 608 (1991).

<sup>15</sup> *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991); *Donna Faye Cardwell*, 41 ECAB 730 (1990) (for harassment to give rise to a compensable disability, there must be some evidence that harassment or discrimination did in fact occur); *Pamela R. Rice*, 38 ECAB 838 (1987) (claimant failed to establish that the incidents or actions which she characterized as harassment actually occurred).

<sup>16</sup> Also, in a July 27, 1999 affidavit, Ms. Wilson specifically denied appellant's allegations of verbal abuse.

<sup>17</sup> See *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 28, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 9, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member